SUPREME COURT, U. S.

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No. 220

In the Supreme Court of the United States

OCTOBER TERM, 1968

IRVING SHAPIRO,

Petitioner,

vs.

LEE T. SHAPIRO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, Irving Shapiro, prays that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this cause on November 13, 1967, and November 28, 1967.

OPINIONS BELOW

No opinions were rendered by the courts below.

JURISDICTION

The judgment of the Appellate Court (Appendix A, *infra*) was entered on November 13, 1967. A motion to vacate that judgment and for other relief was denied on November 28, 1967. (Appendix B, *infra*) A timely "Petition for Appeal As a Matter of Right, or, in the Alternative, for Leave to Appeal" was denied by the Illinois Supreme Court on March 27, 1968. (Appendix C, *infra*) A petition to reconsider that order was denied by the Illinois Supreme Court on May 15, 1968. (Appendix D, *infra*) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether a state reviewing court may, consistent with the due process and equal protection clauses of the Fourteenth Amendment, deny appellate review in a civil case where Petitioner filed his 3,421 page record and fully perfected his appeal by timely action, and thereafter made timely requests, supported by affidavits, for extensions of time within which to file his brief and abstract of record, the last of which requests was denied and judgment of the reviewing court dismissing his appeal was entered; and where, within four days thereafter and twelve days from the date his brief and abstract were due, Petitioner filed a 366 page printed abstract of the record, a 100 page printed additional abstract of over 600 exhibits introduced in the trial proceedings and a 71 page printed brief, together with a motion to vacate the judgment and for leave to file his brief and abstract instanter, which motion was denied; and where the state constitution grants all persons an appeal as a matter of right and the timely filing of briefs and abstracts is not a jurisdictional requirement?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. * * * No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI, Section 7 of the Constitution of the State of Illinois provides in pertinent part:

> "In all cases, other than those appealable directly to the Supreme Court, appeals from final judgments of a Circuit Court lie as a matter of right to the Appellate Court * * * ".

Former Rule 41(2) of the Illinois Supreme Court (Ill. Rev. Stat., 1965, Ch. 110, §101.41(2)) provided in pertinent part:

> " * * * If in any cause, whether on appeal or writ of error, either the abstract or brief is not filed within the time proscribed, the appeal or writ of error will, on the call of the docket, be dismissed. * * * "

Present Rule 343 of the Illinois Supreme Court (Ill.Rev. Stat., 1967, Ch. 110A, §343), superseding former Rule 41(2), provides:

> (a) *Time.* The brief of the appellant in the reviewing court shall be filed, with proof of service, within 35 days from the filing of the record on appeal, except that in cases in which a reviewing court grants leave to appeal or allows an appeal as of right the appellant shall file his brief within 35 days from the order allowing the appeal. Within 35 days from the due date of the appellant's brief, the appellee shall file his brief in the reviewing court with proof of service. Within 14 days from the due date of the appellee's brief, the appellant may serve and file a reply brief. Any reply brief of an appellee or other party permitted by rule

341(h) shall be filed within 14 days from the due date of the appellant's reply brief. A party who allows his petition for leave to appeal or his answer to stand as his brief shall notify the other parties and the clerk of the reviewing court.

(b) *Extending or Shortening Time.* The reviewing court or a judge thereof, *sua sponte* or upon the motion of a party supported by an affidavit showing good cause, may extend or shorten the time of any party to file a brief.

STATEMENT

Respondent, hereinafter sometimes referred to as "plaintiff", initiated proceedings in the Circuit Court of Cook County, Illinois, for separate maintenance from Petitioner on October 9, 1961. (R. 9)[1] Various orders awarding temporary support and attorneys' fees were entered in favor of plaintiff. In addition, a separate action for partition of real property owned by the parties as joint tenants, filed by plaintiff on June 22, 1962, was consolidated for trial with the suit for separate maintenance. (R. 232) This matter, however, was determined in a summary proceeding. (R. 312-314) The issues in the suit for separate maintenance (and in a counter-claim for divorce filed by defendant) were heard by a jury and a verdict rendered in favor of plaintiff on July 8, 1963. (R. 700) Thereafter, on September 22, 1966, a decree of separate maintenance was entered. (R. 899-908) On October 21, 1966, Petitioner filed his notice of appeal from portions of this decree, the temporary support orders and awards for

[1] "R." references are to the page of the record of proceedings in the Circuit Court of Cook County, Illinois, filed in the Appellate Court of Illinois, First Judicial District, as the "Record on Appeal" and certified by that court to this Court.

attorneys' fees which preceded the decree, and the decree of partition which had been entered in the consolidated case.[2] (R. 928) His praecipe for record was filed on the same date. (R. 930)

On November 22, 1966, at Petitioner's request, the time for filing the report of proceedings was extended from December 10, 1966, to and including December 13, 1966,[3] by each of the four trial judges who had heard a portion of the proceedings. (R. 949, 953, 957, 963) The four portions of the report of proceedings were approved on December 13, 1966. (R. 973-979) Ten days later Petitioner filed a "short record"[4] in the Appellate Court of Illinois,

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[2] A party to a civil action in Illinois had and still has thirty days from the entry of judgment or decree within which to file his notice of appeal. Illinois Civil Practice Act, Sec. 76 (Laws 1965, p. 628, §1); Ill.Rev.Stat., 1967, Ch. 110A § 303.

[3] Under Illinois law at the time, the report of proceedings (transcript of evidence) must have been approved by the trial judge and filed with the clerk of the trial court within 50 days after the filing of the notice of appeal. The trial judge was permitted to extend the time for filing the report of proceedings an additional 45 days. Ill.Rev.Stat., 1965, Ch. 110 § 101.36(1)(c).

[4] At the time, Petitioner was allowed ten days after filing the report of proceedings to file his record on appeal in the reviewing court. Ill.Rev.Stat., 1965, Ch. 110 § 101.36(2)(d). Provision was made, however, for the filing of a "short record" consisting of "enough of the record on appeal to show a final order, judgment or decree, notice of appeal filed in proper time, proof of service of a copy * * *, the praecipe for record and proof of service and any other parts of the record * * * necessary to the application made." Ill.Rev.Stat., 1965, Ch. 110, § 101.36(2)(b). The reviewing court was authorized to extend the time for filing the complete record. Ill.Rev.Stat., 1965, Ch. 110, § 101.36(2)(e).

First Judicial District, and his appeal was timely and formally docketed.[5]

At the same time, Petitioner moved the Appellate Court for the entry of an order extending the time for filing the complete record to and including January 22, 1967,[6] setting forth by affidavit of his attorney that the clerk of the Circuit Court had been unable to complete the compilation of the entire record within the time allotted because of the number and volume of pleadings, orders and exhibits. (App. E, *infra*, pp. App. 4-5)[7] This motion was allowed. Petitioner filed a certification that the record was completed for filing on January 19, 1967, thus perfecting his appeal.[8]

Thereafter, on February 9, 1967, a further decree providing for payment of alleged arrearages, awarding Respondent $10,000 for defrayal of attorneys' fees in con-

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[5] Although failure to docket an appeal on time might be considered cause for dismissal, only the filing of the notice of appeal is jurisdictional. *Bozarth* v. *Bozarth*, 399 Ill. 259, 77 N.E.2d 658; see also, Ill.Rev.Stat., 1967, Ch. 110A, § 301. There is no question here, however, that the appeal was docketed on time.

[6] See footnote 4, *supra*.

[7] "App. E" references are to the page of Appendix E in which Petitioner's motions in the Appellate Court, and affidavits in support thereof, have been reproduced in chronological order. These motions and the orders in response thereto have been certified to this Court as part of the record of the Appellate Court.

[8] Illinois law permits the filing of such a certificate rather than the record itself. Ill.Rev.Stat., 1967, Ch. 110A, § 325.

nection with the aforestated appeal, entering a rule to show cause to issue against Petitioner and setting a hearing to determine further attorneys' fees was entered by the Circuit Court of Cook County. (R. 1076B, F, H; 1090-1091) Petitioner filed a timely notice of appeal from these decrees (R. 1093) and, in due time, filed his record in the reviewing court. His motion to consolidate this appeal with his first appeal was granted.

Prior to the order consolidating appeals, and subsequent thereto, Petitioner filed timely motions for extensions of time within which to file his brief and abstract.[9] Each of these motions, except the last, was supported by an affidavit of counsel explaining the cause for the request[10] and

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[9] One practice under Illinois law requires an Appellant to file an Abstract of Record, which may be described as a summarization, or abstraction, of the original papers and orders comprising the "common law record" portion of the record on appeal, and a narration of the pertinent testimony recorded in the "report of proceedings" portion of the record on appeal. Ill.Rev.Stat., 1967, Ch. 110A, §342e.

[10] Petitioner made seven such motions. All were opposed by Respondent. His first, filed on February 17, 1967, was supported by an affidavit reciting that the appeal would be affected by supplementary hearings (see text, pp. 6-7, *supra*), that he was preparing an appeal from adverse rulings in those hearings, and that he would move to consolidate that appeal with the present appeal when it was perfected. (See text, p. 7, *supra*) The affidavit also recited that counsel was engaged in the preparation of two unrelated appeals, and, because of these engagements and the size of the record in the instant appeal, he was unable to complete the brief and abstract within the time allotted to do so. Finally, counsel swore that the application for additional time was not interposed for the purpose of delay. (App. E, *infra*, pp. App. 5-6)

Counsel's affidavit in support of his second motion recited the continued pendency of the related hearings (see text, p. 9, *infra*) and the near perfection of the appeal in that matter, the engagement

each, except that one, was granted, except that the time allowed was usually less than requested. The last order

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of counsel in a prior unrelated matter of length and complication before the Appellate Court, and the length of the record in the instant case, as well as the prospective length and complexity of the brief, as matters which had prevented him from completing the brief and abstract. Counsel again affirmed that the extension of time was not sought for the purpose of delay. (App. E, *infra,* pp. App. 7-8)

Counsel's affidavit in support of the third motion recited that he was engaged in the preparation of the brief and abstract for the now consolidated appeals, that the abstract was unusually voluminous because of the size of the record and required an unusual amount of time in its preparation, and that counsel had been engaged in preparation for an extensive hearing before the Interstate Commerce Commission in New York City previously set for the month of June 1967. Again, counsel swore that the extension of time was not sought for purposes of delay. (App. E, *infra,* pp. App. 10-11)

Counsel affirmed, in support of the fourth motion, that the abstract had been prepared in draft form, that it was being typed and proofread in preparation for submission to the printer, that he was commencing the preparation of the brief which promised to be lengthy and complicated, and that other professional matters had prevented him from devoting full time to this matter. As before, counsel affirmed that the additional time was not sought for delay. (App. E, *infra,* pp. App. 12-13)

Counsel's affidavit in support of his September 29, 1967, motion recited that he had been engaged in the preparation of the brief and abstract but the intervention of two unrelated appeals and a two-week trial in the United States District Court for the Northern District of Illinois had prevented him from completing them. Again, the motion was not interposed for delay. (App. E, *infra,* pp. App. 13-14)

Counsel's affidavit in support of his sixth motion, made on October 24, 1967, recited that the abstract was being typed for submission to the printer, that the brief was being prepared and that his entire office staff was engaged in these tasks. Again, he affirmed that the extension of time was not sought for delay. On October 31, the Appellate Court allowed until November 5th to file the brief and abstract. (App. E, *infra,* pp. App. 15-16)

extended Petitioner's time for filing his brief and abstract to and including November 5, 1967.

On November 3, 1967, Petitioner requested an extension of time to and including November 30, 1967, within which to file his brief and abstract. This motion was supported by the affidavit of an agent of the U. S. Law Printing Company affirming that Petitioner's abstract had been submitted for printing, but stating that, because of the size of the abstract and other commitments, the printing could not be completed in time. (App. E, *infra*, p. App. 17) On November 13, 1967, Petitioner's motion was denied and his appeals dismissed without opinion. (App. A, *infra*, p. App. 1)

Four days later, on November 17, 1967, Petitioner lodged his abstracts and brief with the clerk of the Appellate Court, moved to vacate the order dismissing the appeal, requested leave to file the brief and abstracts instanter, and supported said motions by the affidavit of counsel explaining the cause of the delay. (App. E, *infra*, pp. App. 18-19)

The printed abstract which Petitioner tendered was 366 pages in length. It contained an abstraction of the pleading filed and orders entered between October 9, 1961, the date upon which the suit for separate maintenance was initiated, and February 9, 1967, the date of the entry of the last order appealed from. It also contained an abstraction of certain germane pleadings filed and orders entered between March 7, 1967 and April 21, 1967. The remainder of this volume was devoted to a concise narration of the proceedings had in connection with the filing of the pleadings and the entry of the orders.

A second volume of the abstract, one hundred printed pages in length, contained a summarization of over six

hundred plaintiff's and defendant's exhibits essential to a determination of many of the points raised on appeal.[11] A vast number of these documents were checks and bank statements.

Petitioner's Brief and Argument consisted of a two-page statement of the nature of the case and the issues raised on appeal, a seven-page statement of points and authorities, a four-page statement of facts, a fifty-six-page argument covering nine separate issues of law, and a two-page conclusion and prayer for relief, seventy-one pages in all. Over forty authorities, including statutes, were cited in support of Petitioner's position. He challenged the entire spectrum of orders entered by the trial

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[11] Some idea of the importance of these exhibits and the magnitude of the task involved in abstracting and collating the exhibits can be gained from an examination of Point VI of Appellant's (Petitioner's) Brief and Argument. Under the caption "The Court erred in finding that the defendant had an income of $20,000.00 to $22,000.00 per year when the undisputed evidence received by the court revealed that the defendant's income from 1953 to 1961 averaged per year net approximately $15,419.00 and that for the period 1961 to 1964 averaged approximately $18,564.00 per year net," Petitioner analyzed a multitude of exhibits and from this analysis argued (A) that the trial court abused its discretion in awarding alimony amounting to almost 60% of the defendant's annual income and bearing no reasonable relationship to the status in life which the parties maintained during the marriage; (B) that the error was compounded by the failure of the court to consider the income, business interests and separate estate of the plaintiff; and (C) that the trial court erred in refusing to admit certain defense exhibits which evidenced plaintiff's income, assets and business interests. In making this analysis and argument, Petitioner constructed a four-page "breakdown" of checks written by the parties during the period January 1959 through July 1961 (the month the parties separated). Petitioner also provided a summary of the checks written by the parties during this period which showed the month-by-month living expenses incurred by the parties.

court which adjudicated the property rights and financial obligations of the parties, including various awards totaling $19,000 to the attorneys for the plaintiff as and for temporary attorneys' fees, attorneys' fees in connection with the partition suit brought by the plaintiff (consolidated with the suit for separate maintenance, but summarily disposed of in an independent proceeding, without hearing, despite the verified answer raising issues of fact filed by Petitioner), and attorneys' fees in connection with her defense of the appeal, but exclusive of permanent fees for the prosecution of the suit below. Two of the arguments raised by Petitioner were based on orders entered by the trial court subsequent to the docketing of the first appeal and were encompassed with the second consolidated appeal.

The Appellate Court denied these motions, also without opinion. (App. B, *infra*, p. App. 1)

Thereafter, Petitioner petitioned the Illinois Supreme Court for appeal as a matter of right, or, in the alternative, for leave to appeal from the orders of the Appellate Court.[12] On March 27, 1968, without opinion, the Illinois Supreme Court denied leave to appeal. (App. C, *infra*, p. App. 2) Petitioner's subsequent petition to reconsider that order was denied on May 15, 1968, again without opinion. (App. C, *infra*, p. App. 3)

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[12] Rule 317 of the Rules of the Supreme Court of Illinois (Ill.Rev.Stat., 1967, Ch. 110A, § 317) permits a party to seek review of a decision of the Appellate Court as a matter of right "in cases in which a question under the constitution of the United States or of this state arises for the first time in and as a result of the action of the Appellate Court." The same rule permits an alternative prayer for leave to appeal. Petitioner claimed, in the Illinois Supreme Court, that the dismissal order violated his constitutional rights to due process and equal protection and, under Article VI, Section 7 of the Illinois Constitution, to appeal.

REASONS FOR GRANTING THE WRIT

Article VI, Section 7 of the Illinois Constitution provides:

> "In all cases, other than those appealable directly to the Supreme Court, appeals from final judgments of a Circuit Court lie as a matter of right to the Appellate Court * * * *"

Thus, in Illinois, a party to a civil action has a constitutional right of appeal.[13] *Airline Stewards and Stewardesses Ass'n* v. *Quinn,* 35 Ill.2d 106, 219 N.E.2d 499. Arbitrary or capricious action denying this right not only violates the Illinois Constitution (*Airline Stewards and Stewardesses Ass'n* v. *Quinn,* 35 Ill.2d 106, 219 N.E.2d 499, 500), but denies due process and equal protection as well.

A similar question, although raised in a significantly different context, has previously been before the Court. *National Union of Marine Cooks and Stewards* v. *Arnold, et al.,* 348 U.S. 37. In considering "whether a state appellate court violates either the Due Process or the Equal Protection Clause of the Fourteenth Amendment * * *

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[13] Although the Supreme Court of Illinois has previously held that dismissing an appeal confers jurisdiction as a matter of right in that Court to determine the propriety of the dismissal, "for if the appellate court's dismissal was improper, [appellant has] been denied [his] constitutional right of appeal * * * as the order of dismissal precludes review of the trial court action," (*Airline Stewards and Stewardesses Ass'n* v. *Quinn,* 35 Ill.2d 106, 219 N.E.2d 499, 500) that Court refused to consider the merits of the Appellate Court's action in the present case. As a consequence, there has been no opinion, decision or holding on this question.

when it dismisses an appeal from a money judgment as a reasonable measure for safeguarding the collectibility of that judgment" (348 U.S. at 38), the Court established the framework within which the present Petition is composed. First, the Court decided that a claimed violation of the equal protection clause would not lie where "no showing has been made that anyone comparably situated has been treated differently from petitioner." (348 U.S. at 41) Second, the Court held that the due process clause was not violated where the dismissal was reasonably directed at sustaining the effectiveness of the appealed judgment against the petitioner's attempt to frustrate it. (348 U.S. at 43-45) See also, *Eisler* v. *United States,* 338 U.S. 189; *Allen* v. *Georgia,* 166 U.S. 138.

Mr. Justice Black, joined by Mr. Justice Douglas, dissenting, felt on the other hand that, since the state had provided a system of appellate review,

> "* * * proceedings in its supreme court are merely the final step in the judicial process in trying cases and therefore cannot be conducted so as to deny that 'due process' which the Fourteenth Amendment requires. Cole v. State of Arkansas, 333 U.S. 196, 201-202, 68 S.Ct. 514, 517, 92 L.Ed. 644, and cases there cited. And [the state] also must abide by the Fourteenth Amendment's equal protection command in deciding who can and who cannot appeal. Cochran v. State of Kansas, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453." (348 U.S. at 45-46)

The dissent viewed the dismissal order as "punishment" for the petitioner's disobedience of a court order, "an offense having no relation at all to the merits of the plaintiff's claim or to the petitioner's defense." (348 U.S. at 46-47) Because the appeal was a continuation of the defense which began in the trial court and "From the beginning, due process and equal protection have meant that every defendant must be permitted to defend himself

in any court where his antagonist can appear and prosecute" (348 U.S. at 47; see also, *Hovey* v. *Elliott,* 167 U.S. 409), and because that right belongs to "one who has violated the laws the same as one who has not" (348 U.S. at 47), the dissent criticized the dismissal as a violation of Fourteenth Amendment rights.

Without settling the issues here presented—except, of course, insofar as the dissent's view would clearly support Petitioner's claim—*National Union* set the pace for later decisions. Thus, when the Court learned that a transcript of evidence was critical to effective appellate review of criminal convictions in Illinois and that indigent defendants were being denied such review solely because they could not afford transcripts, it condemned Illinois practice as a deprivation of equal protection and instructed the state to implement its appellate procedures to make them equally and fairly available to all. *Griffin* v. *Illinois,* 351 U.S. 12. A similar attitude was taken toward state procedures which denied effective review because of the lack of counsel (*Douglas* v. *California,* 372 U.S. 353), or because of the lack of ability to prepay statutory docketing fees (*Burns* v. *Ohio,* 360 U.S. 252). There is no particular mystique which differentiates these later decisions merely because they were rendered in the course of criminal prosecutions. As both the majority and dissent in *National Union* pointed out, once providing for appeal, a state must provide it equally and fairly to all. *National Union of Marine Cooks and Stewards* v. *Arnold, et al.,* 348 U.S. 37, 43, 45.

As a consequence, the question here presented is whether a state court may, within these limits described by *National Union,* punish counsel's delay — specifically permitted by Rule (Ill.Rev.Stat., 1967, Ch. 110A, §343) — by denying

his client appellate review. The question is highlighted by the fact that here the delay did not evince a disregard for the rules of court, did not threaten the effectiveness of the judgment and was non-jurisdictional in nature.

In Illinois, the timely filing of briefs and abstracts is not a jurisdictional step in the process of appeal. Prior to the adoption of new Rules of the Supreme Court of Illinois, if a brief or abstract were not filed within the time prescribed, the appeal would be dismissed on the call of the docket. Ill.Rev.Stat., 1965, Ch.110, §101.41(2). New Supreme Court Rule 343 (Ill.Rev.Stat., 1967, Ch.110A, §343), dealing with the filing of briefs and abstracts, omitted that provision. The committee which drafted those rules noted in connection with this omission:

> "The provision in the former rule that if a brief or abstract was not filed within the time prescribed the appeal would be dismissed on the call of the docket was omitted as both too strict and unnecessary. The court has the inherent power to dismiss an appeal for any breach of its rules, although a less drastic remedy would normally suffice. In the rare instances in which a brief of an appellant is inexcusably not filed on time, the court can exercise this power without any provision in the rule specifically authorizing it to do so."

Whether this most drastic remedy should have been imposed in the present case, therefore, raises questions of due process and equal protection unlike those settled in *National Union*. There, it was decided that the petitioner had attempted to frustrate the effectiveness of the state court's judicial process by his actions. (348 U.S. at 43-45) It was also shown that this conduct did jeopardize the effectiveness of this judgment. (348 U.S. at 44) Here, not only did the failure to file Petitioner's brief and abstract on time not jeopardize the effectiveness of the orders

and decrees being appealed, but the circumstances demonstrate that the delay in filing was not inexcusable nor an attempt to frustrate the judicial process. Petitioner undertook a formidable task by his appeal. The record, which he was required to abstract consisted of several volumes and exceeded 3,400 pages, including both the pleadings and the report of proceedings. In addition, over 600 exhibits were essential to a proper determination of the points raised on appeal. Petitioner was diligent in filing his record on appeal, doing so three days before he was required. Thereafter, he duly requested extensions of time within which to file his brief and abstract, supported by the affidavit of his attorney setting forth concise, but valid reasons why the brief and abstract had not been completed. In each, counsel swore that the request was not interposed for the purpose of delay. The last request was occasioned by the inability of the printing company to complete the printing. There were no unexplained delays; the Appellate Court was not left wondering, as it is in so many other cases, as to the progression of the appeal, the reason for the delay, and indeed whether Petitioner had made arrangements for an appeal at all. It was, as the dissent in *National Union* pointed out (348 U.S. at 46), as though the dismissal were punishment for disobedience of the time regulations for filing rather than a means for safeguarding the judgment itself. This is made clear by the fact that, also unlike *National Union,* the appeal was summarily dismissed. See also, *Burns* v. *Burns,* 35 Ill. App. 2d 34, 181 N.E.2d 605.

When, four days after the order dismissing his appeal and twelve days after his brief and abstract were due, Petitioner sought leave to file these documents and vacate the dismissal, the Appellate Court was assured—if it had ever harbored any doubt—that Petitioner had been engaged in this formidable task as his counsel had sworn.

The court had the two abstracts and the brief before it. It could see from the size and complexity of these documents that more than a few days had gone into their preparation. And at this time counsel repeated that the delay in filing these documents had been due to the inability of the printing company to complete the printing involved by November 5th, the date on which the documents were due, and that the printing had been completed within twelve days only because the company had devoted all of its time and energies to the task. (App. E, *infra*, pp. App. 18-19.)

Whether a reviewing court may, under these circumstances, totally deprive a party in a civil action appellate review of asserted trial court errors is as important a question as whether a state may deny effective appeal on the basis of other arbitrary standards. The majority in *National Union* held that the equal protection claim could not be sustained because no showing had been made that petitioner had been treated differently from anyone comparably situated. (348 U.S. at 41) Although no such showing is made here, none could possibly be made.[14] The nature of the circumstances assertedly justifying the dismissal defy the making of any such showing. Extensions of time for filing briefs and abstracts are granted in Illinois. So also are reasonably prompt motions for leave to file these documents instanter after the time for filing

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[14] Statistics showing the average number of extensions of time for filing briefs and abstracts granted parties to an appeal, the average length of time between judgment and filing of briefs or the reasons why extensions are granted or denied are not available in Illinois. There is, in short, apart from a case by case analysis, no way to advise the Court whether the length of time or number of extensions sought in this case exceeded the norm, or whether the reasons advanced by counsel met any informal, "average" standard.

has expired. It is safe to say that the requests made by Petitioner here did not exceed those made by any other comparably situated appellant in Illinois. No modern decision in Illinois records the fate of any appellant who has suffered as drastic a penalty as Petitioner under similar circumstances. Compare, *Burns* v. *Burns,* 35 Ill. App. 2d 34, 181 N.E.2d 605.

That this matter is obscured somewhat by the failure of the Illinois courts to enunciate the basis for denying Petitioner's state constitutional right to appeal is clear. But the failure to take cognizance of this right also involved a failure to comment on his rights to due process and equal protection under the Fourteenth Amendment. As a consequence, it is important for this Court to consider whether the Fourteenth Amendment prohibits a state from denying appellate review as a remedy for a failure to file briefs and abstracts in time, where the delay is explained, does not jeopardize the effectiveness of the judgment being appealed, is promptly remedied, and is not jurisdictional, and where the penalty is not proportionate to the "offense" nor to a fixed standard of experience.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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